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# Russell Nelson, Inc. *and* Operative Plasterers and Cement Masons Local Union No. 538. Case 17–CA–25175

# November 2, 2011

### **DECISION AND ORDER**

# By Chairman Pearce and Members Becker and Hayes

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and an amended charge filed by the Union on June 8, and July 29, 2011, respectively, the Acting General Counsel issued the complaint on August 18, 2011, against Russell Nelson, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On September 14, 2011, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on September 16, 2011, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

# Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that the answer must be received by the Regional Office on or before September 1, 2011. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by letter dated September 1, 2011, notified the Respondent that unless an answer was received by September 8, 2011, a motion for default judgment would be filed. Further, the letter confirmed that during a telephone conversation on August 24, 2011, the Respondent's representative Russell Nelson informed the counsel for the Acting General Counsel that the Respondent did not intend to file an answer to the complaint.

In the absence of good cause being shown for the failure to file a timely answer, we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

# FINDINGS OF FACT

#### I. JURISDICTION

At all material times, the Respondent, a corporation with its office and place of business in Leawood, Kansas, has been engaged in the building and construction industry as a concrete and cement masonry contractor. During the 12-month period ending July 31, 2011, the Respondent, in conducting its business operations described above, performed services valued in excess of \$50,000 in states other than the State of Kansas. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Operative Plasterers and Cement Masons Local Union No. 538, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

- 1. At all material times Russell Nelson held the position of the Respondent's President, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.
- 2. The following employees of the Respondent, the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by Respondent performing work within the jurisdiction of the Union at Respondent's jobsite at O'Reilly Auto Parts, in Holdrege, Nebraska, but excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

- 3. On about May 10, 2011, the Respondent, an employer engaged in the building and construction industry as described above, and the Union entered into a collective-bargaining agreement (the May 10, 2011 agreement) with respect to the terms and conditions of employment of the unit, which agreement was to remain in effect for the duration of the Respondent's work project at O'Reilly Auto Parts in Holdrege, Nebraska.
- 4. At all material times, including from about May 10 until about May 27, 2011, pursuant to the May 10, 2011 agreement, the Union has been recognized as the exclusive collective-bargaining representative of the unit by the Respondent without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act.
- 5. At all material times, including from about May 10 until about May 27, 2011, based on Section 9(a) of the

Act, the Union has been the limited exclusive collectivebargaining representative of the unit.

- 6. On about May 18, 2011, the Respondent failed to continue in effect all the terms and conditions of the May 10, 2011 agreement by failing and refusing to pay wages to unit employees for hours they worked, pursuant to that agreement.
- 7. The Respondent engaged in the acts and conduct described above in paragraph 6 without the Union's consent.
- 8. The terms and conditions of employment described above in paragraph 6 are mandatory subjects for the purposes of collective bargaining.
- 9. On about June 1, 2011, the Respondent, by Russell Nelson, during a telephone conversation, threatened employees with unspecified reprisals because they requested payment of wages for hours worked under the terms of the May 10, 2011 agreement, which had been negotiated on their behalf by the Union.
- 10. On about June 8, 2011, the Respondent, by Russell Nelson, during a telephone conversation, threatened employees with physical violence because they requested payment of wages for hours worked under the terms of the May 10, 2011 agreement, which had been negotiated on their behalf by the Union.

# CONCLUSIONS OF LAW

- 1. By the conduct described above in paragraphs 6, 7, and 8, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.
- 2. By the conduct described above in paragraphs 9 and 10, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.
- 3. The unfair labor practices of the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

# REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to continue in effect all the terms and conditions of the May 10, 2011 agreement by failing to pay wages to unit employees for hours worked pursuant to the May 10, 2011 agreement, we shall order the Respondent to honor the terms and conditions of the May

10, 2011 agreement by paying its unit employees the unpaid wages for the hours they worked under the May 10, 2011 agreement, and to make the unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

#### **ORDER**

The National Labor Relations Board orders that the Respondent, Russell Nelson, Inc., Leawood, Kansas, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to bargain collectively and in good faith with Operative Plasterers and Cement Masons Local Union No. 538, the Union, as the limited exclusive collective-bargaining representative of the employees in the following unit by failing and refusing to pay wages to unit employees for hours they worked under the terms of its May 10, 2011 collective-bargaining agreement with the Union. The appropriate unit is:

All employees employed by Respondent performing work within the jurisdiction of the Union at Respondent's jobsite at O'Reilly Auto Parts, in Holdrege, Nebraska, but excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Threatening employees with unspecified reprisals because they requested payment of wages for hours worked under the terms of the May 10, 2011 collective-bargaining agreement negotiated by the Union on their behalf.

The Acting General Counsel's motion seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no unlawful conduct. Further, the Acting General Counsel requests that the Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

- (c) Threatening employees with physical violence because they requested payment of wages for hours worked under the terms of the May 10, 2011 collective-bargaining agreement negotiated by the Union on their behalf.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Honor and comply with the terms and conditions of the May 10, 2011 collective-bargaining agreement with the Union by paying the unit employees the unpaid wages for the hours they worked that have not been paid since May 18, 2011, with interest, in the manner set forth in the remedy section of this decision.
- (b) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct, with interest, in the manner set forth in the remedy section of this decision.
- (c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Within 14 days after service by the Region, post at its facility in Leawood, Kansas, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 17. after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>3</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pend-

ency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 18, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 2, 2011

Mark Gaston Pearce,	Chairman
Craig Becker,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

# **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Operative Plasterers and Cement Masons Local Union No. 538, the Union, as the limited exclusive collective-bargaining representative of our employees by failing and refusing to pay wages to unit employees for hours they worked under the terms of our May 10, 2011 collective-bargaining agreement with the Union. The appropriate unit is:

<sup>&</sup>lt;sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>&</sup>lt;sup>3</sup> For the reasons stated in his dissenting opinion decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

All employees employed by us performing work within the jurisdiction of the Union at our jobsite at O'Reilly Auto Parts, in Holdrege, Nebraska, but excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT threaten you with unspecified reprisals because you requested payment of wages for hours worked under the terms of the May 10, 2011 collective-bargaining agreement negotiated by the Union on your behalf.

WE WILL NOT threaten you with physical violence because you requested payment of wages for hours you worked under the terms of the May 10, 2011 collective-bargaining agreement negotiated by the Union on your behalf.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL honor the terms and conditions of our May 10, 2011 collective-bargaining agreement with the Union by paying you the unpaid wages for the hours you worked that have not been paid since May 18, 2011, with interest.

WE WILL make you whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest.

RUSSELL NELSON, INC.